178

No. 454.

Br. of Boyle & McDermott for Pet'r

Supreme Court of the United States.

OCTOBER TERM, 1900.

Supreme Court U. S.
FILED
OCT 22 1900
JAMES H. McKENNEY,
Clerk.

Filed Oct. 22, 1900

THE FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Petitioner,

VERSUS

R. H. COURTNEY, Receiver, etc,

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF IN SUPPORT OF THE PETITION.

ST. JOHN BOYLE,
EDWARD J. McDERMOTT,
Counsel for the Fidelity & Deposit Company of Maryland.

JOHN P. SMITH & CO., PRINTERS, LOUISVILLE, KY.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, PETITIONER,

VERSUS

R. H. COURTNEY, RECEIVER, ETC.

MOTION.

Now comes the Fidelity & Deposit Company of Maryland, by St. John Boyle and Edward J. McDermott, its counsel, and moves this Honorable Court that it shall by a writ of *certiorari* directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, require said Court to certify to this Court for its review and determination a certain cause in said Court of Appeals lately pending, wherein the Fidelity & Deposit Company of Maryland was plaintiff in error and R. H. Courtney, Receiver, etc., of Louisville, Kentucky, was defendant in error; and to that end now tenders herewith its petition, together with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

ST. JOHN BOYLE,
EDWARD J. MCDERMOTT,
Counsel for the Fidelity & Deposit Company of Maryland.

Notice of the foregoing motion is hereby accepted this 17th day of October, 1900.

W. J. COOK, *successor to* R. H. COURTNEY, *Receiver*,

By WM. SMITH, *Counsel.*

INDEX.

PAGE

1. MOTION, ... i
2. PETITION, ... 1
3. BRIEF, ... 17
   (*a*) Statement, ... 17
   (*b*) First point. Knowledge of the Directors was knowledge of the Bank, ... 21
   (*c*) Second point. Knowledge of the active Vice-President and Cashier was knowledge of the Bank, ... 40
   (*d*) Third point. Cashier's letter to Surety admissible without proof of special authority, ... 48
   (*e*) Fourth point. "Immediate notice" not the same as "notice with reasonable promptness" or "within a reasonable time," 55
   (*f*) Fifth point. A claim made five and a half months after Bank closed, and five months after the knowledge of some defaults, is not made "as soon as practicable," . . 61

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1900.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND

VERSUS

R. H. COURTNEY, RECEIVER OF THE GERMAN NATIONAL BANK, OF LOUISVILLE.

PETITION OF THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND FOR A WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES THE APPEAL TAKEN BY THE SAID FIDELITY AND DEPOSIT COMPANY OF MARYLAND AGAINST THE SAID R. H. COURTNEY, RECEIVER.

To the Honorable, the Chief Justice and Associated Justices of the Supreme Court of the United States:

The petition of the Fidelity & Deposit Company of Maryland respectfully represents as follows:

First. Your petitioner is a corporation of the State of Maryland. The respondent to the petition, R. H. Courtney, is Receiver of the German National Bank, of Louisville, which bank was organized under the laws of the United States in relation thereto, and the said Courtney was duly appointed receiver thereof by the Comptroller of the Treasury.

Second. On February 5, 1898, R. H. Courtney, Receiver, began an action at law in the United States Circuit Court for

the District of Kentucky against the petitioner, the Fidelity & Deposit Company of Maryland, upon a bond. This bond was one executed by the Fidelity & Deposit Company as surety for the performance of the duties of one J. M. McKnight, first as Vice-President and then as President of the German National Bank of Louisville. The defendant in that action answered, and there was a trial by jury and a verdict and judgment for the plaintiff for the amount of the bond, $10,000.

Third. It appears that a short time prior to June 1, 1894, J. M. McKnight was made Vice-President of the German National Bank, with Adolph Reutlinger as President and a director, and his son, Rudolph Reutlinger, as cashier and teller. On June 1, 1894, the said McKnight executed a bond in the sum of $10,000, with the Fidelity & Deposit Company as his surety, conditioned for the faithful performance of his duties as such Vice-President. On January 1, 1895, McKnight became President, and A. Reutlinger, the former President, became Vice-President, with a salary of $1,500 per year for constant attendance at the bank. This bond was renewed for McKnight as President for one year on June 1, 1895, and was renewed for another year on June 1, 1896.

On January 18, 1897, the Comptroller of the Currency closed the German National Bank, and a few days thereafter appointed R. H. Courtney, Receiver, and McKnight was arrested on January 19, 1897. The said Receiver brought this action February 5, 1898, to recover the amount of the bond, charging that McKnight was a defaulter in the sum of $18,742.74. Some of the items contained in the account were abandoned by the Receiver at the trial, but more than $10,000 of items were still claimed.

Fourth. The defense was a denial of the defaults, and, in addition, the Company set up provisions in the bond which, it was claimed, were not regarded by the bank, and the disregard of which by the bank operated to discharge the obligation of the bond.

Fifth. The bond itself was lost or mislaid, but was contained in a printed form, the important parts of which are as follows:

"Bond No. ———

"Fidelity & Deposit Company of Maryland.

"Home Office: Baltimore, Md.

"Amount, $——— Annual Premium, $———

"Know All Men by These Presents:

"That ——— (hereinafter called the 'Employee'), and the Fidelity & Deposit Company of Maryland (hereinafter called the 'Company') are held and firmly bound unto ——— (hereinafter called the 'Employer') in the sum of ——— dollars, lawful money of the United States of America, to be paid to the said employer, his or their certain attorney, executors, administrators, assigns or successors, to which payment well and truly to be made, we and each of us do bind ourselves, respectively, and our respective heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

"Sealed with our seals, and dated the ——— day of ——— Anno Domini one thousand eight hundred and ninety——."

"Whereas, The Employee has been appointed in the service of the Employer, and has been assigned to the office or position of ——— by the Employer, and application has been made to the Fidelity & Deposit Company of Maryland for this bond;

"And, Whereas, The said Employer has delivered to the Company a certain statement, and it being agreed and understood that such statement constitutes an essential part of the contract hereinafter expressed:

"Now, therefore, in consideration of the payment of the sum of ——— dollars, lawful money of the United States of America, to the Company as a premium for the term commencing at the date hereof and ending on the ——— day of ——— eighteen hundred and ninety ———, at 12 o'clock, noon, the Company does hereby agree that it will, within three months after receipt of proof satisfactory to its directors, and subject to the conditions hereinafter expressed, reimburse the Employer to an amount not in excess of the penalty of this bond, for such pecuniary loss as the Employer shall have sustained by any fraudulent act or acts committed by the Employee during the continuance of this bond, in the performance of the duties of his said office or position, or of such other position as he may be subsequently appointed to or called upon to fill by the Employer in said service, of money, securities or other personal property belonging to the Employer, or for which the Employer is responsible.

"This bond may be continued from year to year, at the option of the employer, at the same or an agreed premium rate, so long as the Company shall consent to receive same, in which case the Company shall remain liable for any dishonest act of the Employee occurring between the original date of this bond and the time to which it shall have been continued.

"This bond is issued and continued upon and subject to the following conditions and provisions:

"That the actual payment of the premium and its acceptance by the Company, for either the issue or continuance of this bond, is essential to its currency, and a condition precedent to a right to claim hereunder.

"That the Employer shall immediately give the Company notice in writing of the discovery of any default or loss hereunder, and shall file with the Company his or their claim hereunder, with full particulars thereof, as soon as practicable thereafter, and no claim which shall not be so filed by the Employer with the Company within six months after the expiration or cancellation of this bond, or within six months after the Employee shall have ceased to be in the Employer's service, shall be payable hereunder.

"That if the Employee leave the service of the Employer during the currency of this bond, for any cause whatever, the bond shall thereon expire, and the Company shall be notified in writing by the Employer, and the amount of unearned premium shall be refundable to the Employer on application, and no claim which shall not have been made on the Company within six months after the Employee leaves the service, during such currency, shall be valid or recoverable hereunder.

"That upon notification to the Company of any loss hereunder, the Company's liability shall thereupon terminate as regards any subsequent act of the Employee.

"That the Employer shall observe, or cause to be observed, due and customary supervision over the Employee for the prevention of default; and if the Employer shall at any time during the currency of this bond condone any act or default on the part of the Employee which would give the Employer the right to claim hereunder, and shall continue to the Employee in its service without written notification to the Company, the Company shall not be responsible hereunder for any default of the Employee which may occur subsequent to such act, or default so condoned.

"That the Employee shall not be required or permitted to perform permanently the duties of a dual capacity in the service of the Employer which would admit of the possi-

bility of fraud by false entries and absence of check by another officer.

"That there shall be a complete inspection of the accounts and books of the Employee on behalf of the Employer at least once in every twelve months from the date of this bond, such inspection to include examination of all cash and securities of which the Employee shall have custody or charge.

"That the Employee has not, within the knowledge of the Employer, been at any time in arrears or default in either this or other employment.

"That the Employer shall at once notify the Company on becoming aware of the Employee being engaged in speculation or gambling, or indulging in any disreputable or unlawful habits or pursuits.

"That if the Employer shall at any time hold concurrently with this bond any other bond or guarantee or security from or on behalf of the Employee, the Employer shall be entitled, in the event of loss by default of the Employee, to claim hereunder only such proportion of the loss as the amount covered by this bond bears to the whole amount of security carried on the Employee's behalf.

"That the Company may, upon giving one month's notice in writing to the Employer, cancel its responsibility hereunder, in so far as concerns the acts or defaults of the Employee subsequent to the end of such month; in which event it will, upon request of the employer, refund the proportion of the premium paid for the unexpired term of this bond.

———— Employee.
———— President."

Sixth. Shortly before the renewal of McKnight's bond on June 1, 1896, the Fidelity & Deposit Company wrote the following letter to *the bank*, and received the following answer from the cashier:

"Security Department. No. 5002. Bond Division.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Home Office, Baltimore, Maryland.

BALTIMORE, May 15, 1896.

"To GERMAN NAT'L BANK,
Louisville, Ky.

"Dear Sir: We hereby notify you that Bond No. 5002 for $10,000, issued by this Company on behalf of Jacob M. McKnight, in your employ as President, will expire on the 1st day of June next.

"The premium, $40.00, should be paid on or before the

date of expiration, otherwise the bond will lapse. Kindly have the certificate below filled in and signed, and forward with remittance for premium to Jos. S. Odiorne, Gen'l Agent, when the renewal receipt will be sent to you.

Yours respectfully,
EDWIN WARFIELD,
President."

"To Fidelity and Deposit Company of Maryland:

"This is to certify, That on the ——— day of ———, 189—, the books and accounts of Mr. J. M. McKnight, is President, in our employ, as has no books and accounts were examined by us, and we found them correct in every respect and all moneys handled by him accounted for.

"He has performed his duties in an acceptable and satisfactory manner, and we know of no reason why the guarantee bond should not be continued.

"His salary is now $4,500.00, and he is employed as President.

"Signature,
"R. E. Reutlinger, Cash.,
"Employer.

"Dated at Louisville, Ky., May 29, 1896.

"To Employer—Notice of Expiration."

When these letters were offered in evidence, the Court refused to allow them to be read to the jury, being of opinion that the cashier had no power, by reason of his office, to make the statement that the books and accounts had been examined and found correct, and the moneys accounted for. If this letter from the cashier did bind the bank, then the renewal of the bond was obtained by a false representation of the cashier, and which he knew was false.

In the Circuit Court of Appeals the judges disagreed upon this point, a majority being of opinion that the case was ruled by American Surety Co. v. Pauly, 170 U. S. 133–160, in which the President, when a bond was first applied for, wrote a letter of recommendation for the cashier, and it was held that the President had no authority by virtue of his office to bind the bank by such statements.

It is respectfully submitted that the majority of the Court wrongly applied the decision in American Surety Co. v. Pauly; and the decision in that case, that the President had no such

authority, is not a decision that the Cashier has not, especially when a letter of inquiry had been duly addressed to *the bank* by the surety and the Cashier replied in due course and seemingly with authority. The duties and powers of a President and Cashier are essentially different, and it is conceived that, under the circumstances of the division of the Court upon a question which is more or less vital in suits of this character, it should be conclusively settled by the Supreme Court, so that no misapprehension may be had of its previous decision.

Seventh. The defaults of McKnight which formed part of the verdict are substantially as follows:

(*a*) The mayor of the city of Louisville having died, McKnight became a candidate for the vacancy, which was to be filled by the City Council. His opponent was one George D. Todd. The manager of Mr. McKnight's race was one S. E. Edmunds, who came frequently to the bank to consult about the canvass, and who had conversations with the Vice-President and cashier, and, as the Bill of Exceptions states, they "knew the purposes of his visits." This was in January, 1896. The City Council was composed of twelve aldermen and twenty-four councilmen, and among the members were Jenne, Sowders, Glover, and Adams. They demanded of Edmunds $1,000 before they would agree to vote for McKnight. McKnight at the critical time of the canvass thereupon directed the cashier (who was also teller of the bank) to take $1,000 to another bank and get for Edmunds ten bills of $100 each, which the cashier did, and delivered the same to Edmunds. The money was divided among the four members, who signed the following agreement:

> "I hereby pledge myself to vote for J. M. McKnight for Mayor of the City of Louisville, first, last, and all the time, until elected or defeated before the General Council."

Edmunds, who was himself in need, and who had no money in the bank, gave his individual check for the money, and the money was never paid to the bank. There was evidence sufficient to show that the active officers of the bank, and indeed all of the directors, must necessarily have known that McKnight

was a candidate for the office; that it was a matter of general notoriety and was discussed in the newspapers, and those that knew of the affairs of the bank, or paid the attention that their duties called for, must have known of the transaction. The Vice-President and the cashier both knew of it, though both deny that they knew that the money was to be used in such a manner.

(*b*) McKnight, however, was defeated for the office, whereupon a great dissension arose between Mayor Todd and the City Council. Seven of the Board of Aldermen, constituting a majority, were opposed to the mayor and his measures. For some purpose not disclosed, McKnight sought to control this majority, but two of the aldermen, Messrs. Britt and Reeder, wavered in their loyalty. Edmunds, political manager for McKnight, acted as the negotiator in this transaction also; whereupon McKnight told the cashier that he had "a big scheme on hand"; requested him to keep the bank open on February 6, 1896, until after dark. Whereupon, about 6:30 P. M., Edmunds, with Britt and Reeder, appeared at the bank. Edmunds prepared a note for $2,000, payable in one year without interest, and then Britt and Reeder signed it and then went up stairs, and, after they had signed the agreement following, they came back to the cashier, and he then paid them, by direction of McKnight, $2,000 without deducting or receiving any money for interest. The note reads as follows:

"Louisville, Ky., Feb. 6, 1896.

"$2,000.00.

"One year after date we promise to pay to the order of ourselves two thousand dollars without defalcation, value received, negotiable and payable at the German National Bank.

"F. A. Britt,
"John W. Reeder.

"Indorsed:
"F. A. Britt, John W. Reeder."

Edmunds borrowed from Britt and Reeder $225.00 of the money inside the bank. Whereupon the seven aldermen, including Britt and Reeder, executed the following agreement:

"LOUISVILLE, KY., February 5, 1896.

"We do this day and date agree with one another, and bind ourselves on our sacred words and honor, that we will stand together on any and all propositions of legislation that may come before the body of which we are members, namely, the Board of Aldermen of the City of Louisville; that we will so caucus with our friend J. M. McKnight, and act wisely, and secure for our friends an equal division of the offices and any profit that may arise therefrom; that we, as men and members of the Upper Board, will not allow the Mayor to force upon us any appointments that we do not deem wise and to our interest, and in so doing will not act the first night of the meeting on any proposition sent in by the Mayor, but will take one week for consideration and caucus.

"Now we have calmly considered the above, and do again pledge ourselves one to the other before subscribing our names this day and date, Feb. 5, 1896, in the presence of one and the other. C. J. Jenne, J. E. Leatherman, R. E. King, R. O. Breuner, J. D. Trick, F. A. Britt, John W. Reeder."

This transaction was certainly known to the cashier, and that night at 9 o'clock he went to the house of his father, Vice-President and director, to tell him about it, and it thus became known to the Vice-President and one or more of the directors, and the Vice-President asked an explanation of this extraordinary transaction of the President next day, and was so dissatisfied that he brought the matter up before the Board of Directors, who were satisfied with McKnight's assurance that he would have the note secured or would pay it himself, though no explanation was made why the money was lent for a year without interest. Britt and Reeder were men without property, and the note was not discounted and *bore no interest.*

(*c*) On January 1, 1896, McKnight drew his check upon the bank for $1,253.00 in payment of a claim in the hands of attorneys against him. This check, at McKnight's request, was carried by the cashier as a cash item from January 21 until March 12, 1896, when it was charged to the account of S. E. Edmunds & Co., in which McKnight had an interest, but which account resulted in a loss to the bank.

On March 12, 1896, he drew another check for $1,650.00 for

the same purpose, and this was charged to an account called the "Louisville Deposit Collateral Account," in which McKnight, as the cashier knew, had no interest, but was an account belonging to the bank itself.

(*d*) On June 6, 1896, McKnight drew a check for $3,736.60 in payment of a private debt, and charged it to the account of "E. G. Williams, Special." The said Williams was a broker in whisky, and was employed by the bank to sell whisky owned by it; and the account belonged to the bank, and McKnight had no interest therein, as the Cashier knew.

(*e*) McKnight was also overdrawn, and he seems to have been habitually overdrawn to a large amount. Other items suffice to make McKnight's defaults exceed the amount of his bond.

Eighth. On these facts it was claimed in behalf of the surety on his bond that it had been released from liability under the following clauses:

> "That the Employer shall observe, or cause to be observed, due and customary supervision over the Employee for the prevention of default; and if the Employer shall at any time during the currency of this bond condone any act or default on the part of the Employee which would give the Employer the right to claim hereunder and shall continue to the Employee in its service without written notification to the Company, the Company shall not be responsible hereunder for any default of the Employee which may occur subsequent to such act, or default so condoned.
>
> . . . . . .
>
> "That the Employee has not, within the knowledge of the Employer, been at any time in arrears or default in either this or other employment."

As there was evidence tending to show a want of due and customary supervision required by the terms of the bond, and as there was also evidence of gross carelessness and neglect on the part of the other officers and directors of the bank, the Court's instructions to the jury evidently confused their minds on the subject. The Court observed:

"What is due and customary supervision is something that has not been made very clear by the evidence in making out this defense. I don't know that it has been made clear to the jury any more than it has to the court as to what is the customary supervision that is meant, or what is the due supervision that is meant."

Nor did the Court ever define what was meant by the expression of due and customary supervision. The case was submitted to the jury on May 2d, but no verdict was reached on that day. On the subsequent day, after deliberation, the jury requested the Court to further instruct them, and propounded in writing this inquiry:

"If the jury agree that the directors of the bank were careless in the management of the bank, shall the jury find for the defendant?"

To this inquiry the Court responded:

"Gentlemen of the jury, no such issue as that stated in this question was presented. The mere question of whether or not the directors generally were careless in their management of the bank is not a question for your consideration, nor would it exempt the defendant from the obligation imposed by the bond sued on. You have already been instructed as to the meaning and effect of the condition of the bond as to due and customary supervision, and outside of that there is no provision as to carelessness."

This was objected to as misleading, and it served the purpose of impressing upon the jury that no carelessness could be a want of due and customary supervision. Undoubtedly the jury asked for an instruction on this point in order to have it explained to them how far carelessness would amount to want of such supervision. The jury were evidently misled by the expression of the Court, and the entire instruction to the jury on the subject was erroneous, because it contained no reference to the effect on the question of supervision which should be given to the conduct of the officers who had knowledge of the transactions of McKnight.

Ninth. Upon this question of the knowledge of the cashier, the Court instructed the jury as follows:

> "I do not think that the knowledge of a cashier of a bank, speaking generally, is the knowledge of the bank as to any matter that does not come within the customary or ordinary duties of a cashier or those which have been specially imposed upon him by the action of the bank. I do not think Mr. R. E. Reutlinger in this case, in respect to any matter which he knew or could do, represented the bank, if it was outside of his ordinary duties; and I do not recall any thing that he knew, so far as the proof shows, that would in any wise affect the liability of the defendant in this case."

The cashier, Mr. R. E. Reutlinger, knew of all the transactions of McKnight, and they came to him in the course of his ordinary duties as such cashier and in no other way, and it was his duty to convey the information to the directors of the bank. Yet the Court said:

> "I do not recall any thing that he knew, so far as the proof shows, that would in any wise affect the liability of the defendant in this case."

Tenth. The Court further instructed the jury:

> "If you believe from the evidence that this transaction was known and condoned by *the bank* at the time, before these other transactions occurred, then the defendant in this case is not liable. But if you believe, on the contrary, that *the bank* did not know it, that it was the fraudulent act of McKnight alone, not participated in by the bank—when I say the bank, I mean the bank, I do not mean any individual director—then the defendant is liable."

The evidence in the case showed that the Vice-President, who was a salaried officer and a director and in constant attendance at the bank, and at least one other director, Mr. Reisch, knew of the extraordinary transaction of McKnight with Britt and Reeder, and the object of the transaction. It was even brought before the board of directors itself. It is submitted that if, in such case, notice to other officers and one or more directors is not notice to the bank, then the only conclusion that can be arrived at is, that there must be a definite formal communication to the entire board, or to the board in session, before notice can be imputed to the bank.

Eleventh. Another ground of defense arose out of a clause in the bond which is as follows:

> "That the Employer (1) shall *immediately* give the Company notice in writing of the discovery of any default or loss hereunder, and (2) shall file with the Company his or their claim hereunder, with full particulars thereof, as soon as practicable thereafter, and (3) no claim which shall not be so filed by the Employer with the Company within six months after the expiration or cancellation of this bond, or within six months after the Employee shall have ceased to be in the employer's service, shall be payable hereunder."

R. H. Courtney was appointed Receiver of the bank on the 18th of January, 1897, and began the performance of his duties January 22, 1897. McKnight was arrested January 19, 1897. The Receiver said: "Almost immediately after the bank passed into my hands as receiver, I began to ascertain the defalcations. . . . It was almost immediately after the bank closed that these defalcations became known; not all of them, but enough to ground the claim upon." The Bank Examiner said he discovered defaults in two weeks after the bank closed, January 18th. Hence he discovered them by the 1st or 2d of February. No notice was given to the Fidelity & Deposit Company of McKnight's default until thirty days after the bank closed, or on February 18, 1897, when the Receiver wrote the following letter:

"J. M. McKnight, President. H. H. Rademaker, Vice-President.
R. E. Reutlinger, Cashier.
German National Bank.

"Louisville, Ky., February 18, 1897.

"To the Fidelity & Deposit Company of Maryland, Baltimore, Md. Gentlemen: Referring to the certificate No. 4043, issued from your security department, guaranteeing the fidelity of Jacob M. McKnight, President of the German National Bank, under your bond to him, No. 5002, issued June 1, 1894, in favor of such bank, we hereby notify you that said Jacob M. McKnight, as President, has been found in default to this bank, and that you will be required to make an indemnity to me as Receiver to the extent of said bond. Yours truly,

"R. H. Courtney,
"Receiver German National Bank."

No further notice was given, and no claim filed until July 3d thereafter, a delay of five months after defaults were first discovered.

On the contrary, the Receiver, though he had obtained information of specific defaults, not only did not communicate the facts to the Company, but on March 6, 1897, brought a suit in the Jefferson Circuit Court against McKnight upon these defaults, which were made the subject afterward of the claim and suit against the surety. In that suit he sued out an attachment against the property of McKnight; and, on the trial of the present case, the Court instructed the jury that no effect should be given to this fact. The Court's instructions upon this point affirmed that the indefinite notice of February 18th was a sufficient notice under the contract, and that the filing of a claim on July 3d, though the particulars were known to the Receiver nearly four months before, was a sufficient compliance with that provision of the contract requiring the particulars to be furnished to the Company "as soon as practicable." In the American Surety Co. v. Pauly, 170 U. S. 146, the claim was filed in thirty-one days after the notice was given.

Twelfth. Recently, and during the last term of the Supreme Court, in the case of the Guarantee Co. of North America v. The Mechanics' Savings Bank & Trust Co., upon the petition of the complainant, a writ of certiorari was granted to the Circuit Court of Appeals for the Sixth Circuit to certify that case to the Supreme Court for review. It will be observed that that case was decided by the same Circuit Court of Appeals as the present one.

The controversy in that case arose upon a bond given by a bank cashier which was similar in its provisions to the one involved in this litigation. The interpretation and effect of some of the same provisions of the bond are in question in that case as in this. The principles which are to govern in the decision of that controversy are largely the same as those which have been raised in the present suit. Both cases involve the same general questions, which will determine the relation which the paid sureties on the present forms of official bonds bear to the

obligee. How far they may be governed by the ordinary laws of suretyship, how far by the laws which govern policies of insurance, and whether their relations are to be likened unto those of insurers against fire, etc., or those of life, what is "due and customary supervision," what is notice to one officer or director of another officer's defaults or wrongdoing, what suspicious circumstances are sufficient to put officers or directors upon inquiry, and how far they must pursue their investigations and when they must communicate to the surety what they have learned—all these are questions more or less involved in the controversy in both cases. Under these circumstances, it is submitted that this case ought to be also certified to be heard with the one already certified to the Court.

Thirteenth. For these reasons your petitioner respectfully prays that a writ of certiorari may be issued directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court, on a day to be fixed, a full and complete transcript of the record and the proceedings of the said Circuit Court of Appeals in the case of the Fidelity & Deposit Company of Maryland v. R. H. Courtney, Receiver, to the end that the said case may be reviewed and determined by this Court, as provided by law, and that your petitioner may have such other and further relief in the premises as the Court may deem just and proper.

ST. JOHN BOYLE,
EDWARD J. MCDERMOTT,
Counsel.

STATE OF KENTUCKY, }
JEFFERSON COUNTY. }

Willis S. Mullin, being first duly sworn, says that he is the General Agent of the petitioner, the Fidelity & Deposit Company of Maryland, for the State of Kentucky, and as such has been engaged in the case mentioned in the foregoing petition; that he has read the foregoing petition, and that the facts therein stated are true to the best of his information and belief.

_____.

Subscribed and sworn to before me, this ——— day of ———, 1900.

_____.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, PETITIONER,

VERSUS

R. H. COURTNEY, RECEIVER, ETC.

BRIEF IN SUPPORT OF THE APPLICATION FOR A WRIT OF CERTIORARI.

The questions involved in this case touch the life of bond-companies, and go to the root of the law of suretyship as applied to them. If the decision in this case be allowed to stand, there can rarely be a defense to an action against a Bond Company as a surety. The law of suretyship will be revolutionized; and, in spite of contract rights, to go on a bond will mean in most cases to pay all losses, no matter how unfair, negligent, or reckless the persons getting the bond may be. The result will be that the premiums for bonds must become higher or the companies must quit business. The loss in the end will fall on employers of ordinary care and honesty who do not need, and do not ask, to be protected against their own bad faith, gross neglect, or gross folly.

Several of the most important questions involved in this case are also directly presented in the case of the Guarantee Company of North America v. The Mechanics Savings Bank & Trust Company, in which case a writ of certiorari to the Circuit Court of Appeals for the same Circuit has been twice granted by this Court, once at the October term of this Court in 1897 and finally

at the last term of this Court a few months ago. The main questions involved in that case are the same as several important questions in this. In both cases the Court must decide what is "due and customary supervision" over an officer in a bank, what notice to a surety of an officer's misconduct good faith requires, and how far knowledge of one officer or director is to be treated as knowledge of the bank or the Board of Directors. The true meaning of the American Surety Company v. Pauly, 170 U. S. 160, must be made clear or the law of guaranty and suretyship will be greatly and unwisely altered. According to the principles of that case, the petitioner in this case should have been exonerated. In spite of a strongly adverse charge in the Circuit Court; in spite of the natural prejudice of a jury against a corporation like a Bond Company, the jury evidently wanted to find a verdict for the surety; because the jury were long hung and, on the second day, would not find for the complainant without asking for a further charge; and the second charge was so strong against us that they evidently felt that there was nothing else to do but find a verdict for the complainant, even though it were not consonant with their own ideas of justice.

In the argument in the Circuit Court of Appeals the question came up whether the rights of a bond company as a surety were different in any respect from the rights of an individual bound as a surety. Only one difference has been or can be logically made. It has properly been held that where the construction of the contract of the surety company is doubtful, it will be construed against the surety, because such a contract is prepared by skillful attorneys of the surety company, and, in such a case, surety companies will be treated as insurance companies are treated; but a surety company, like anybody else, has a right to limit its liability by contract, and, when the contract is clear, it must be enforced. It can not be ignored or brushed aside merely because the contract was made for a consideration. All contracts are based upon a consideration, and, except in ascertaining what the meaning of the contract is, no distinction can be drawn

between the contract of an individual surety and the contract of a corporation surety. The essential contract rights of corporations and individuals, under like circumstances, must be the same wherever impartial courts enforce the law. In the case at bar it is not pretended that there is any ambiguity in the contract. The meaning is clear, and the only question is whether this clear contract shall be reasonably and fairly enforced. We are only asking that facts, which would have exonerated a private surety without compensation under all former decisions, shall also exonerate the Fidelity & Deposit Company, which went on the bond for a small fee. We only ask that we shall be held entitled to the same good faith and the same notice that any private surety would have been entitled to, and without which the surety would have been released. All this should be made plain by the Supreme Court for the guidance of the bond companies and the courts.

In times past courts, in determining the rights of private persons who have become bound as sureties, have not sought to ascertain whether the surety became bound for a good or a valuable consideration, nor to whom nor from whom the consideration moved. Whether a surety signed for money or on account of friendship was not inquired into, and made no difference in his rights, and would make no difference in his rights to-day. The courts have never attempted to make distinctions between valuable considerations in any form of contracts, and whether the Fidelity & Deposit Company was or was not paid to sign McKnight's bond can not be considered in this case. Bond companies serve a useful purpose. They are in their infancy. Unless their premiums are increased, it is doubtful whether many of them can live. The percentage of loss would be enormous if employers could be negligent or reckless and yet hold the surety for embezzlements that could be prevented by ordinary care. The desire or demand on the part of the public for suretyship or guarantyship by corporations rather than by private individuals is steadily increasing, and surely the courts should do nothing to

prevent the gratification of such a reasonable desire. The competition between the companies, of which there are now a great many, will inevitably reduce the cost of the premium in each case to the lowest point consistent with reasonable profit. The action of competition in this way can be relied on with perfect confidence. Hence, in a short time, the premium will become so small that it will merely cover the risk of loss, when there has been reasonable care on the part of the employer to prevent loss. If the courts, however, lay down all the bars and say that the surety must pay, practically in every case, no matter how gross the carelessness or negligence of the employer may be, these companies must either go out of existence or the rate of insurance or premium must become so high that it will be a great burden upon the people of ordinary honesty and reasonable diligence. It would be highly inequitable and unwise to make such suretyship too expensive for diligent and business-like men, in order that there might be absolute protection for those who are totally negligent and unbusiness-like, and who invite, by their want of care and good sense, the defalcations of their employes.

It is not contended that employers must use such care and intelligence as will render defaults almost impossible or very rare. It is only contended that it is for the benefit of everybody but the incompetent or the slothful that employers who take bonds must still show reasonable attention and diligence in guarding against the defaults of their servants; and that sureties, whether private individuals or corporations, shall be treated with candor and fairness. To allow reckless employers to hold sureties in nearly all cases will encourage fraud and crime—will multiply temptations to unwatched employes and increase the cost of a surety to thrifty and conscientious employers. *Et ne nos inducas in tentationem.*

FIRST POINT.

The knowledge of Directors Reutlinger and Reisch of McKnight's defaults bound the Bank, but we understand the decision of the lower court to greatly restrict, if it does not nullify, the rule that the knowledge of a director acquired in the business of the Bank is generally the knowledge of the Bank.

In this case the complainants have recovered judgment against the surety for several defaults, but the first in time was a payment of $1,000 by the Cashier of the bank to S. E. Edmunds, the political manager of McKnight, in ten one-hundred dollar bills on January 21, 1896, on the order of McKnight, who became a candidate for mayor of the City of Louisville before the General Council thereof a few days after the death of the Hon. Henry S. Tyler on January 14, 1896. With that $1,000.00 S. E. Edmunds bought four councilmen and got from them a written pledge to vote for McKnight. A race for mayor in a big city like Louisville was of course a subject of profound interest and earnest discussion to everybody in the city, including, of course, the officers and directors and clerks of the bank, whose President was a candidate. (R. 46.) A few days after January 14, 1896, McKnight became a candidate, and a few days after he became a candidate, to wit, January 18, 1896, he was overdrawn in bank $1,340.12. On January 20, 1896, he was overdrawn $1,460.14. On January 21, 1896, he told his Cashier to give his well-known political manager, Edmunds, who was in constant conferences about the election at the Bank itself, $1,000.00 in ten one-hundred dollar bills. (R. 44.) He was particular to have ten bills of $100.00 each. Nothing else would do. The Cashier, who was also teller, did not have ten bills of $100.00 each. McKnight sent him out to another bank on that peculiar mission, to get that special kind of money. The Vice-President, who was the father of the Cashier and a director (R. 44.), heard the President send the Cashier and teller out to

get the money in that strange way for the political boss whose headquarters seemed to be in the Bank during this exciting race; and the money was paid to the boss on his own check, when he had no money in bank and was himself in need. By the order of McKnight that check was held up by the Cashier as cash in his drawer from January 21, 1896, to March 12, 1896, seven weeks (R. 43.); and then it was charged, not to the man who got the money and who gave his individual check for it, but to S. E. Edmunds & Company, in which McKnight was a partner.

On that same 21st day of January, 1896, when McKnight was overdrawn in a large sum, he gave another check of $1,253.00 to some Louisville lawyers to pay a private claim against himself, and that check, too, at his request, was held up by the Cashier for seven weeks in his cash drawer as cash, and was not charged to anybody till March 12, 1896, and then it was charged to S. E. Edmunds & Company (R. 47). The Vice-President and director saw that this check also was being held up in this improper way by his son, and was told by the Cashier that this was being done by order of McKnight.

It can easily be understood why the officers and directors of a bank on the verge of bankruptcy might want its President to become mayor of the city and, by means of city deposits and political patronage, get the Bank a new lease on life, and why the officers in desperate straits might connive at corruption, if they did not directly aid in it, to secure his election, and why they might later conveniently forget or pretend to misunderstand the plainest features of the transaction.

A few days after McKnight's political manager had bought the four councilmen with the ten one-hundred-dollar bills, McKnight was beaten for Mayor by Mr. George D. Todd; and there was great dissension between McKnight's gang and the successful candidate's supporters. McKnight, out of spite or because he hoped to get political patronage that would pay him and the bank, organized an opposition party; and, to block the measures of the successful mayor and to control municipal affairs,

he needed seven of the twelve aldermen. He could count on five and must buy two more. Britt and Reeder were willing to sell. Edmunds was used to buy them. McKnight, on February 6, 1896, about two weeks after the purchase of the four councilmen, Jenne, Sowders, Glover, and Adams, and a few days after the election, told the Cashier and teller to keep the bank open that evening after banking hours; "that he had a big scheme on hand, and that it was a big thing" (R. 45), not that it was merely to lend a little money of the Bank in a legitimate way. At 6:30 P. M. Edmunds appeared at the Bank with two aldermen—Britt and Reeder, who had no property. Edmunds wrote out a note for $2,000.00, which was not to bear interest for a year—wrote it out in the presence of the Cashier and McKnight. But the money was not given to them at once. They must first do something else to get the money (R. 45). They went up stairs over the bank where "the gang," the other five aldermen, were waiting for them, and there they and the five other aldermen signed a written agreement to the effect that McKnight should be their political boss and that they would only vote after consulting him. Meanwhile the Cashier was waiting for Britt and Reeder to come down for their money. They came down, and then they were allowed to get their hands on the money, no interest being deducted in advance. Immediately, in the Bank, Edmunds demanded his part of the corruption fund, and they gave him $225.00.

At 9:30 o'clock that same evening the cashier ran to his father's house to tell him, the Vice-President and the director, of this strange business. The next morning the Vice-President called for an explanation from the President. The President said the note was good, and that it *would* be guaranteed by two sureties, whom he named, but they never did give the guaranty. He did not explain why $2,000 of the Bank's money was being lent for a year without interest. In the same conversation, McKnight (R. 46), who "had a long yellow envelope in his hand" (containing, of course, the corrupt pledge), told the Vice-President that

"those fellows (the Aldermen known, of course, to the Vice-President and his son) had signed it, and that he would not sign that for the city of Louisville;" that "he had a meeting up stairs (while the Cashier was waiting, and of which, of course, he must have known) and that paper was signed, and he would not sign it for the city of Louisville." The language of the President could leave no doubt in any sane man's mind what he meant. To suppose that a man who had had sense enough to be President and Vice-President of a National Bank in a big city for about twenty years did not have sense enough to know that a corrupt deal had been made, and that a lot of rascals had signed an incriminating and disgraceful paper, would be unreasonable.

The Vice-President testified that he was not satisfied with the explanation of the President; and, being really unfriendly to the President, he brought the matter before the board and told them that he had examined into the condition of the two aldermen who had gotten two thousand dollars of the Bank's money under such suspicious and questionable circumstances, and that they had no property; that they were insolvent. McKnight then came before the board of directors and said that the note *would* be guaranteed by two sureties (who never did so); and that, if not, he (then heavily overdrawn and having the Cashier hold up checks for him to the amount of at least $2,253.00 as cash items in the cash drawer) would pay it himself. The directors, so child-like and bland, were satisfied. Any thing satisfied them.

All the foregoing circumstantial evidence was proven by the witnesses of complainants. No witnesses were called for the defendant. As to all these matters, there was no contrariety of evidence, excepting that the Cashier, to clear himself, said that he never understood what any of these queer things meant, and excepting that his father, the Vice-President, to clear himself, said that he never understood them; but one of complainant's witnesses, Director Reisch, honestly testified that the Vice-

President did understand them; that the Vice-President, in the bank, when Reisch was discharging his duties as director, told him, just after the Britt and Reeder corruption, just how the corruption was effected. Reisch on direct examination by complainant's attorney said:

> "No, sir; I just heard about it, about that Reeder note, about two days after, that Reeder went up that night in the bank and got $2,000.00 out, but that was about two or three days after that happened . . . Old man Reutlinger (Vice-President and Director) told me; he said the bank was open about six o'clock that night, and *Britt and Reeder and the whole gang there*, he gave a note and got $2,000.00 out of the bank. . . . No, sir, I just heard after that it was for the Council race, the Todd race, something like that. . . . I heard that three days after the money was out of the bank. . . . *Q.* What was it you heard in three days after the money was out of the bank? *A.* That the bank was open after six o'clock and they got $2,000.00 out of the bank. . . . Old man Reutlinger (Vice-President) told me that. . . . That the money was used for the Mayor's race, for the Todd race. . . . *Q.* Are you certain that Mr. Reutlinger told you that? *A.* He told me not in the directors' meeting; he told me that outside. . . *Q.* Were you not in the directors' meeting when that note was considered? *A.* Yes, sir, I believe that *that note did come up* and McKnight said, if Reeder did not pay it, he would."

Vice-President Reutlinger denied this, but Director Reisch is borne out by circumstantial evidence and by the inherent probabilities. At any rate, beyond all dispute, one director, Mr. Reisch, from whatever source he got his information, knew of this corruption, and he knew it before the matter came before the board; and the legal presumption is that he did his duty by telling the board what he knew. Notice to him was notice to them.

The payment of that $1,000.00 to Edmunds and the payment of the $2,000.00 to Britt and Reeder were held by the Circuit Court and by the Circuit Court of Appeals, according to the terms of the bond, to be "acts or defaults on the part of the employe (McKnight) which would give (and did give) the

employer (the bank) the right to claim" under the bond; and the bond provided that if the bank should "condone any such act or default," or should thereafter continue McKnight in its service without written notice to the surety, the bond company should not be responsible for any subsequent default. All the defaults for which the surety was held liable were these defaults and defaults that occurred later; and yet the Edmunds default and the Britt and Reeder default were clearly known at the time by the officers and several directors, and, we think, by the board itself; and those defaults were condoned; and, at any rate, the notice which was provided for in the bond was never given to the surety.

In spite of the foregoing fair statement of the evidence as it appears in the bill of exceptions, the Circuit Court, in the charge to the jury, said:

> "That none of them (the officers and directors of the bank) had any knowledge that any act of his (McKnight's), in the management of the said bank, was fraudulent or dishonest, until after the closing of the bank . . . that none of the officers of said bank, including the directory, had any knowledge of the various checks set up in the petition as fraudulent, etc."

The checks set up in the petition as fraudulent were the Edmunds check, the Britt and Reeder note, and the other checks that followed them, one of them being on the same date as the Edmunds check, and also held up for seven weeks as cash in the drawer. Every fraudulent act of McKnight described above he was able to do and did do "in the performance of the duties of his office or position." Every thing he did he was able to do by reason of his power as President, and every one of those acts was done in the Bank itself. His orders to the Cashier and his dealings with Edmunds were in the Bank itself; and Cashier Reutlinger and his father, Vice-President and Director Reutlinger, learned of all these things in the bank, in due course of its business, and while they were respectively engaged in attending the business of the bank.

The Court also told the jury positively that Cashier Reutlinger and Vice-President and Director Reutlinger did not understand the fraudulent nature of the Edmunds check for $1,000.00 or the Britt and Reeder note for $2,000.00. The Court also told the jury, in substance, that if the Cashier or Vice-President or any individual directors knew of these frauds and concealed them from the surety, the surety would still be liable unless "THE BANK," that is, the Board of Directors, as such, had knowledge of the frauds, practically had formal notice of them. The Court said:

> "The testimony in respect to the knowledge of THE BANK of the purpose for which the $2,000.00 was taken out at half past six or seven in the evening, I say the knowledge of THE BANK respecting that, must be proven, in my judgment, in such a way as to satisfy the jury that THE BANK, *as distinguished from any mere director of it, knew* of that transaction. . . . If you believe from the evidence that THE BANK did know of this fraudulent purpose and that this default of McKnight's, this fraudulent act of McKnight's, in getting this $2,000.00 was known to the Bank at the time, then I instruct you that all of the liability of the defendant in this case would cease then, that being the earliest or one of the earliest, if not the earliest, of all these transactions. If you believe from the evidence that this transaction was known and condoned by THE BANK at the time, before these other transactions occurred, then the defendant in this case is not liable. But, if you believe on the contrary that THE BANK did not know it, that it was the fraudulent act of McKnight alone, not participated in by *the Bank—when I say the Bank, I mean the Bank, I do not mean any individual director*—then the defendant is liable."

The jury must have understood this to mean that, even though they should differ from the Court and should believe that Director Reutlinger and Director Reisch, and even other directors, did know of McKnight's frauds, still their knowledge was not the Bank's knowledge, and that only a formal action of the Board of Directors of the Bank or a formal notice to the Board of Directors could be said to prove the knowledge of the Bank. If that be sound law, it will practically be impossible

ever to bring guilty knowledge home to "the Bank" itself or to the Board of Directors as a Board; and yet the Circuit Court of Appeals, giving a similar quotation from the charge, says: "We think this instruction as favorable as the Company was entitled to." If this be a fair statement of the law, directors of a corporation who wanted to indulge in questionable or corrupt practices with impunity could and would always find it easy and expedient to keep their information and records in such shape that nobody could bring out proof of guilty knowledge on the part of the corporation or Board of Directors.

This very case illustrates the impossibility of proving corrupt actions in the way required by the Court. Here not a witness could defendant find or introduce to prove these bald, unmistakably corrupt transactions. All proof of them had to be extorted by cross-examination from unwilling witnesses whose interest and wish it was undoubtedly to shield themselves from blame by saying that they did not understand what any boy of sixteen or any man of the dullest mind could have understood if he did not have a motive for refusing to understand. Let it be noted that all the incriminating circumstantial evidence against Vice-President Reutlinger, Cashier Reutlinger, and Director Reisch was admitted by them. Director Reisch admitted that he was told and, at any rate, thoroughly understood the corruption in the Britt and Reeder loan. Vice-President Reutlinger admits every thing, except that he denies that he saw or knew of the actual purchase of the four councilmen and the contents of their pledge or the contents of the corrupt pledge by the seven aldermen, including Britt and Reeder. He admits he knew every thing else about those two transactions. So does the Cashier. Let us concede, for the sake of argument, that we had never been so lucky as to prove by cross-examination of complainant's own witnesses the actual payment of the Edmunds' $1,000 to the four councilmen and the contents of the written pledge, and the contents of the corrupt Britt and Reeder loan; let us concede that, and still there would be enough evidence to show knowledge of

McKnight's guilt by Vice-President Reutlinger, Cashier Reutlinger, and Director Reisch. Vice-President and Director Reutlinger tells enough to show this, for he admits that he overheard McKnight's directions to the Cashier about the ten one-hundred-dollar bills, etc., and he admits that his son told him of the Britt and Reeder loan the same night, and that next morning he called McKnight to account when the latter had in his hand the yellow envelope, and which he then showed Vice-President Reutlinger, saying (as appears in the Bill of Exceptions, R. 40) that "*those fellows* had signed it, and that he would not sign that for the city of Louisville;" that "he had a document there in his pocket which was signed by those fellows," "the gang," as Reisch called them; that "he had a meeting up stairs (as the Cashier knew the evening before), and that paper was signed, and he would not sign it for the city of Louisville." "This conversation was had with him by the Vice-President when the Britt and Reeder matter was being discussed."

Even if Vice-President Reutlinger and Cashier Reutlinger and Director Reisch did not know the contents of those two corrupt pledges, or did not see the money paid, they at any rate knew enough to put them on inquiry—to make it their duty to investigate fully. When Vice-President Reutlinger, as he admits, began the investigation into the corrupt loan to Britt and Reeder, and reported it to the Board of Directors, it was his duty and the duty of the board to sift the matter to the bottom. The slightest investigation would have brought this corrupt matter to light. Political matters of that character, widely discussed in the newspapers, can not be concealed, and the officers and directors of the bank had enough information to enable them to probe the matter to the bottom. Edmunds, the political boss, and the aldermen and councilmen involved, could be easily investigated. The language of the Circuit Court of Appeals, fairly interpreted, practically lays down the doctrine that a bank or any other corporation can escape the duty of investigation and of exercising "due and customary supervision," and can escape the penalty of

fraudulent action by merely pretending to be satisfied with a trivial investigation and flimsy pretenses, such as McKnight offered, and by not passing any resolution as a board, or by not allowing any record or communication to be made of matters well known to the directors and officers individually. When we said that the directors in this case knew the fraud in the Edmunds transaction, and in the Britt and Reeder transaction, we were answered with the statement that those were questions of fact which were found against us by the jury, but the jury were compelled to ignore the proof as to those facts, because they were told in the charge that the knowledge of the individual directors or of the officers made no difference—that such knowledge was not the knowledge of the Bank, and that we could escape only by proving notice to the Bank itself or its Board of Directors, apparently in formal session. The verdict of the jury can not be construed to mean that the jury believed that the officers and individual directors were ignorant of the fraudulent nature of the Edmunds check and the Britt and Reeder loan, because the jury were told, as a matter of law, that the knowledge of the Cashier and the Vice-President, or of the individual directors, was not the knowledge of the Bank, and could not exonerate the surety.

As Director Reisch admitted that he knew, two or three days after the Britt and Reeder loan, of the corrupt nature of that loan, the jury would have been compelled to find for the surety, if they had not been told that any knowledge of Reisch alone of that corrupt deal was not the knowledge of the Bank, and would not justify a verdict for the surety. Not a syllable of evidence was there to contradict the admission of Director Reisch that he knew of this matter, even though there might be a dispute as to who gave him the information—whether it was Vice-President Reutlinger or somebody else.

The Circuit Court of Appeals, in its opinion, says:

> "We must remember that this obligation was intended to secure the bank against the fraudulent conduct of McKnight in the performance of the duties of his office or position;

that McKnight's action, in order to require notice to the company, must have been 'of the discovery of any default or loss under the bond.' While McKnight MIGHT *have been guilty of reprehensible conduct*, it would not require notice unless such as might result in the loss of securities, or money, or personal property of the bank by fraudulent conduct in the performance of his duties to the bank."

This is very mild language for a court of justice to apply to McKnight's purchase of four councilmen and two aldermen, and his causing his private debts to be paid on his own check when he was overdrawn in a large amount, and when he caused his checks to be held up as cash for seven weeks, and then had them charged to an improper account; but, waiving that mild censure of such conduct, it must be said that every act of McKnight's of which we complained was an act for which we were compelled to pay under our bond, because of his "fraudulent conduct in the performance of his duties to the Bank." Of all those acts so well understood we were entitled to notice at the time under the terms of our bond.

The Court says further:

"Misconduct which would not amount to a fraudulent act affecting the duties of the officer of the bank, would not require notice unless it came within that clause of the bond which requires the employer to notify the company when the employe engages in gambling or speculation, or indulges in disreputable or unlawful habits or pursuits. Whether McKnight's conduct was of this character, the court left the jury to determine. They must have found that there was no such misconduct as would avoid the bond while the bank was in operation, and which it was the duty of the bank to report to the company."

In the first place, all of McKnight's misconduct consisted in "fraudulent acts which affected his duties as an officer of the bank." In the next place, it could not be said that the jury "must have found that there was no such misconduct as would avoid the bond while the bank was in operation, and which it was the duty of the bank to report to the Company," for the simple reason that the charge of the court below practically told

the jury that the fraudulent acts of McKnight were unknown to the officers of the Bank and to the Directors of the Bank, and that no matter how fraudulent his conduct might be, and no matter how well the Vice-President, the Cashier and Director Reisch might have known of his misconduct, we could not be exonerated unless "the Bank" itself, that is, the Board of Directors, had formal notice of his misconduct, or, in some unmistakable way, as a board, connived at his misdoings.

The Circuit Court of Appeals also say:

> "In this connection it is averred that the Court erred in saying that this knowledge must be the knowledge of the bank, intending thereby to exclude the knowledge of individual directors. In the charge above quoted, as to the knowledge of the bank directors, we have already said that we find no error. We have carefully examined the record and find no knowledge brought home to the directors individually or the cashier in his individual capacity which was not brought to the attention of the Board, which would amount to a default under this bond. Such knowledge, in order to be binding upon the bank, must have been acquired in the course of business of the bank by such officer or director."

In the first place, we have shown from the Bill of Exceptions that Mr. Reisch, a director, testified that Vice-President and Director Reutlinger in the Bank itself told him two or three days after the Britt and Reeder loan that $2,000.00 had been gotten from the bank by two of the "gang," whom McKnight had at the bank at 6:30 P. M., and that it was used "for the council race, the Todd race, something like that." This would certainly "amount to a default under this bond." And nobody has ever pretended that this information was brought in this straight and direct form to the attention of the Board itself; but as two directors had the information, the legal presumption is that they gave their information to the Board. If the admission of Director Reisch as to what he was told by Vice-President and Director Reutlinger is not sufficient to show that these two directors knew of the corrupt use for which the Britt and Reeder loan was made, then no such fraud could ever possibly be satisfactorily proven. The

resumé above of the circumstantial evidence and the Cashier's own admissions show that the jury could have found, and we believe would have found, if correctly instructed, that the Cashier did have knowledge in his individual capacity of these frauds. All the knowledge which Vice-President and Director Reutlinger and Director Reisch and Cashier Reutlinger had was "acquired in the course of business of the bank transacted by such officer and director" in the bank. They got, so far as the proof shows, no knowledge outside of the bank or when they were transacting any business except that of the bank itself. After reading the bill of exceptions, showing the direct testimony of Director Reisch and the admissions of Vice-President Reutlinger and Cashier Reutlinger, we are at a loss to understand how this could be said in the opinion of the Circuit Court of Appeals:

> "The testimony shows no such knowledge of McKnight's conduct acquired in the bank's business by individual directors or officers of the bank and unknown to the Board, as would entitle the Company to notice."

If we were entitled to notice at all of any of these fraudulent and disgraceful proceedings connected with the Edmunds check for the purchase of four councilmen and the Britt and Reeder loan for the purchase of two aldermen, then undoubtedly the knowledge of these transactions had by Cashier Reutlinger and Vice-President and Director Reutlinger and Director Reisch was undoubtedly acquired in the Bank's business, and, according to complainant's testimony, that knowledge was never directly communicated to the Board as a board. Surely the highest court in our land ought to avail itself of a chance to say whether such reprehensible and disgraceful conduct on the part of the President of a bank, as occurred in this bank, can go on unchecked and unreported by the officers and directors of a bank, and yet there be no duty on the part of the bank to the surety who guaranteed the faithful conduct of the President, and who would be entitled to notice of any conduct of his in connection with the

bank that would be likely to inflict a heavy loss upon his surety. We have shown that Director Reisch by performing his duty as director in looking into the affairs of the bank, in the bank building itself, learned, whether from the Vice-President or not is immaterial, of the corrupt political deal between McKnight and Britt and Reeder, whereby the bank's $2,000.00 was lent without interest for a year to two insolvent city politicians; and yet the Circuit Court of Appeals in its opinion quotes with approval this language from Boone on the Law of Banking, Section 132:

> "A notice to one or more of the directors when engaged in the business of the Bank will be deemed notice to the Bank."

If that be sound law, why did the Bank or the Board of Directors not have notice (quoting the identical language of Reisch from the Bill of Exceptions) that "the bank was open about six o'clock that night and Britt and Reeder and *the whole gang* there; he gave a note and got $2,000.00 out of the bank;" that "it was for the Council race, the Todd race, something like that;" "that the money was used for the Mayor's race, for the Todd race."

Can it be that the surety under this bond was not entitled to notice of such outrageous corruption as that, when the Bank knew it, because Director Reisch knew it, to say nothing of Vice-President Reutlinger and the Cashier? Here (to use the language of this Court in American Surety Company v. Pauley, 170 U. S. 147) was "not simply a suspicion of the existence of such facts as would justify a careful and prudent man in charging another with fraud or dishonesty;" on the contrary, here was knowledge of such political corruption with the funds of the Bank as would justify any careful and prudent man, any honest man, in charging the President with fraud and dishonesty. If the Bank could allow its President to go on in such conduct without notice to a surety, who could afford to be a surety on his bond? There can be no dispute of the fact that Vice-President Reutlinger, as well as Reisch, knew that the Bank, at

McKnight's request, was kept open until 6:30 P. M. to lend $2,000.00 of the Bank's money, without interest for a year, to two members of the Board of Aldermen, before whom McKnight had been a candidate for Mayor a few days before, and that those men had no property and gave no surety. This much, at least, was discovered by Vice-President Reutlinger and reported to the Board of Directors in formal session. When the Board went that far under these suspicious circumstances, it was the duty of the Board to probe the matter to the bottom. As this Court said in Martin v. Webb, 110 U. S. 7, 15, in speaking of the diligence which Directors must exercise:

> "That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

In Clerk's Savings Bank v. Thaw, etc., 2 Mo. App. 367, one director was told for whose benefit a certain note in controversy was discounted, and this director (like Director Reisch) was present in the Board as a director when the note was offered for discount and received by the Bank. The Court said:

> "We think this evidence quite competent, as tending to show notice to the bank that the paper was made for the accommodation of Morse & Co., and not of the Sectional Dock Company, and putting them on inquiry as to Drew's power and authority to make or endorse paper in the name of the Dock for any such purpose."

In the case of the National Bank of Asheville v. Fidelity and Casualty Company, 89 Fed. Rep. 819 (1898), it was held that the knowledge of the President of the dishonesty and flight of the Cashier, before the bond was renewed, bound the Bank and made the bond voidable. The Court held:

> "While under a bond insuring the fidelity of an employe, which requires the employer to make disclosure of any dishonesty of the employe known to him, the employer is not

bound to use diligence to discover such dishonesty, yet where in the exercise of ordinary and reasonable care and prudence in giving attention to facts known to him, he could not have failed to draw the inference that the employe was a defaulter, he may properly be charged with knowledge of such fact."

To the same effect is Thompson on Corporations, Sec. 5224. Union Bank v. Campbell, 4 Humphrey, 394. Bank of Pittsburg v. Whitehead, 10 Watts, 397; 36 Am. Dec. 186. Smith v. South Royalton Bank, 32 Ver. 341; 76 Am. Dec. 179. City Bank of Columbus v. Philips, 22 Mo. 85; 64 Am. Dec 254.

We have here a case like that of Graves v. The Lebanon National Bank, 10 Bush (Ky.), 23, in which Judge Lindsay said:

"There is no principle of law more settled than that persons proposing to become sureties to a corporation for the good conduct and fidelity of an officer to whose custody its money and other valuables are to be intrusted, have a right to be treated with perfect good faith. . . . We have, therefore, a case in which the directory of the Bank held out to others as a trustworthy officer a man who had been guilty of repeated embezzlements and frauds, all of which might have been discovered by the exercise of slight diligence."

In Morse on Banks and Banking, Sec. 134, it is said:

"The general rule actually adopted is as follows: If the director acquired it (knowledge) in his official capacity, or in the course of or in relation to any special matter or function of which he had charge as an agent of the Bank, then he knows it as a director, and the law holds that the Bank also knows it. . . . Whatever knowledge a director acquires within the scope of his official employment he is bound to communicate to his co-directors, that is to say, to the Bank itself. If he neglects to do so, the Bank is liable for the neglect of its agent to perform the duty of his agency. By either road the same conclusion is arrived at, which is the liability of the Bank to the same extent as if it had known what its director knew and ought to have communicated."

Not only in this case have we the direct and unqualified admission of Director Reisch that he knew how corruptly the

$2,000.00 had been lent to Britt and Reeder for a year without interest, but we have also strong circumstantial evidence to show that the Vice-President and other directors and the Cashier knew of McKnight's defaults.

In Tolbridge v. Betsworth, 30 Conn. 380, it was held that, as a general rule, what the directors of a corporation know regarding matters affecting the interests of the corporation the corporation will be held to know, and *knowledge on the part of the directors may be inferred from circumstances*, and it is not always necessary to show it by direct proof.

In the case of the Conn. Mutual Life Insurance Company v. Scott, 81 Ky. 540, the Court exonerated a surety because the Insurance Company had not notified the surety of its agent that the agent had been in default and had taken his son into partnership with him. The Court said:

> "A brief recitation of them (the facts shown by circumstantial evidence) will be sufficient argument to show that the appellant knew, or ought to have known, of the existence of the partnership, and actually acquiesced in its conduct of the business of the agency. . . . And it will not be allowed to draw a distinction between the knowledge of its president and other officers who transact the daily business of the company, and knowledge received by its board of directors in official session, for the purpose of escaping the effect of such a knowledge. There are two good reasons for disallowing such a distinction in a case like this—first, because information coming to the officers elected by the board, and entrusted with the daily transaction of the business of the company and those who deal with it, and which is necessary or naturally connected with its performance, and which such officers are in duty bound to disclose to the board, must be treated as the information of the board and binding upon it; second, because if this were not so, all advantages would be given the company in admitting or denying the information, which might never find its way to the board in official session or in its technically official capacity, although its president and other officials might possess the information and be the only channel through which it could ordinarily be communicated to the board."

In the McKnight bond sued on, the Bank specifically agreed:

(1) That it would observe "due and customary supervision over

the employe (McKnight) for the prevention of default," and (2) that "if the employer should at any time during the currency of his bond condone any act or default on the part of the employe which would give the employer the right to claim thereunder, and should continue the employe in its service, without written notification to the Company, the Company shall not be responsible, etc." The Court, in its instructions, gave the jury no aid in deciding what "due and customary supervision" was, and when the jury, being unable to agree, on the second day, asked if they should find for the defendant "if they agreed that the directors of the Bank were careless in the management of the Bank," they were told in strong terms that carelessness of the directors in the management of the Bank could not be considered by them; and yet carelessness is but a want of "due and customary supervision."

It is evident that the jury did not believe that the directors had exercised "due and customary supervision" over McKnight; it is evident that the jury believed that the directors had been careless; that they either knew of his defaults or could have known of them by slight care, and, therefore, the jury evidently wished to find for the defendant, if they could do so on that ground. The directors, under their oath, provided by the National Banking Act, were compelled "diligently and honestly to administer the affairs of such an association."

In Marshall v. Farmers M. S. Bank of Am., 85 Va. 676; 17 Am. St. Rep. 84, the directors of a bank, for their negligence and carelessness, were held personally liable to the creditors of the bank, the Court saying:

> "Ignorance on the part of the directors of a bank of any fact which it is their duty to know can never be set up by them in defense or exculpation for any act which the existence of that fact should have prohibited."

In People v. Jansen, 7 Johns. 331, the sureties on a bond were released because of the neglect or carelessness of the officers

of the State in exercising proper supervision over the officer in default, the Court saying:

> "The security had a right to look to the provisions of the statute and calculate his liability on the presumption that the duties enjoined upon these public officers would be faithfully and punctually discharged, and if so, he could in no event be liable for more than one year's deficiency."

See Harbor Comm'rs v. The Guaranty Company of N. America, 22 Canada Sup. Court, 542 (see note 19 C. C. A. 276); Philips v. Foxall, L. R. 7 Q. B. 666.

In United Society of Shakers v. Underwood, 9 Bush (Ky.), 609, 621, the Court held that the directors of a bank were personally liable for their carelessness, and that

> "Whatever information might be acquired by ordinary attention to their duties, they may, in controversies with persons transacting business with the bank, be presumed to have. . . . It is not necessary in many cases to show directly that the directors had their attention called to the mismanagement of the affairs of the bank, or the misconduct of the subordinate officers. It is sufficient to show that the evidences of mismanagement or misconduct were such that it must have been brought to their knowledge unless they were grossly negligent or willfully careless in the discharge of their duties."

In the case of Briggs v. Spalding, 141 U. S. 132, the Supreme Court said, as to the care which a Board of Directors ought to exercise to prevent default, the following:

> "If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible."

It is clear that Director Reisch and Vice-President and Director Reutlinger, after the Britt and Reeder "gang" had gotten $2,000.00 out of the Bank on a corrupt loan for a year without interest and without security, though they had no prop-

erty, ought to have used care to discover the true situation of affairs, and they would thus have easily detected McKnight's political corruption with the means of the Bank. The publicity which hostile newspapers give to such political deals makes their detection easy. McKnight's scheme to block the efforts of the Mayor of the city by corrupt control of seven aldermen, a few days after the election, could not long be concealed from the Mayor's supporters in the Council and in the press.

SECOND POINT.

The knowledge of Vice-President Reutlinger and Cashier Reutlinger of McKnight's defaults bound the Bank, but we understand the decision of the lower court to greatly restrict, if it does not nullify, the rule that the knowledge of such officers acquired in due course of business is the knowledge of the Bank.

In this case the Vice-President, who was also a director, was not a mere figurehead. He was paid a salary of $1,500.00 per year (R. 44) for constant attendance in the Bank with active duties to perform. His desk was in the Bank (R. 50), where he could see and hear all important transactions. "He frequently examined the books of the Bank and kept the run of the Bank and what notes were discounted by the Bank and what overdrafts existed." "He sometimes acted as Cashier and Teller for his son." He was "familiar with the management of the German National Bank during all the time Mr. McKnight was there." He was (R. 47) "custodian of the Bank's cash reserve of many thousands of dollars." "It was the custom of the Cashier (R. 47) to tell his father, the Vice-President, all that went on at the Bank, etc." There was no collusion between the Vice-President or Cashier and McKnight because "the feeling between Adolph Reutlinger, the Vice-President, and McKnight (R. 47) was not friendly during the year 1896." On March 11, 1895, he wrote a letter to the Fidelity & Deposit Company about McKnight's bond (R. 40), but this letter was excluded by the

Court from the jury. Evidently this was an active officer of the Bank.

The circumstantial evidence already set out shows that the Vice-President knew all about the Edmunds check for $1,000.00 and the Britt and Reeder loan except as to the contents of the two corrupt pledges and the names signed to them. He certainly knew there was crookedness and fraud, if not political corruption, in these deals; and that was enough for him to know. As the Bill of Exceptions shows (R. 46), he often had conversations with Edmunds, the political boss, during the heat of the canvass, at the Bank, which was evidently the political headquarters, and "*knew the purposes of his visits.*" As to the Britt and Reeder loan, he knew all that any man of sense needed to know to understand that a fraudulent political deal was being carried out with $2,000.00 of the Bank's money. The knowledge of an active Vice-President, who was a director, when the President was perpetrating frauds and when there was no collusion, ought to be considered the knowledge of the Bank when outsiders are concerned; and all the authorities cited and the reasoning applied in the American Surety Company v. Pauly are consonant with that principle.

The proof of the Cashier's guilty knowledge is equally complete; but we understand, and we believe the jury understood, the Court's instructions to say in substance:

> (1) That the Cashier did not have knowledge of any fraud or default;
>
> (2) That if he did have such knowledge, he did not get it in due course of business (though all he learned was learned while he was at work on the Bank's business in the Bank itself);
>
> (3) That if he did have such knowledge, it made no difference in law, because his knowledge is not the Bank's knowledge.

The Circuit Court told the jury in substance that notice to the Cashier of McKnight's defaults was not notice to the Bank, and yet when we, in complaining of this erroneous charge, say

that the Cashier did have such notice, and that the jury, if correctly instructed, would have so found, we are answered by the Circuit Court of Appeals with the statement that the jury found by their verdict that there was no notice. In the Court's Fifth Instruction (R. 73–4), which referred to the knowledge of the officers and directors of McKnight's defaults, the Court by repeatedly saying "if the Bank had known" and "if the Bank did not know, etc.," must evidently have led the jury to believe that no knowledge of the officers or directors of the Bank was of any consequence; that "the Bank" itself must know, that is, the Board itself must know, and this is made clear by the Sixth Instruction, which says (R. 74):

> "I do not think that the knowledge of a cashier of a bank, speaking generally, is the knowledge of the bank as to any matter that does not come within the customary or ordinary duties of a cashier or those which have been specially imposed upon him by the action of the bank. I do not think Mr. R. E. Reutlinger in this case, in respect to any matter which he knew or could do, represented the bank, if it was outside of his ordinary duties; and I do not recall any thing that he knew, so far as the proof shows, that would in anywise affect the liability of the defendant in this case."

The National Banking Act (Section 5136, Sub-section 7) authorizes a National Bank to exercise its powers "by its board of directors, or duly authorized officers or agents." As said in Boone on the Law of Banking, Section 103, "the cashier of an incorporated bank is the general executive officer to manage its affairs in all things not peculiarly committed to the directors, and he is *the agent of the corporation, and not of the directors.* As such executive officer he transacts most of the business of the bank. He is held out to the world by the bank as its general agent for the transaction of its affairs, within the scope of the general usage, practice and course of business of banking institutions; and his acts within such scope of authority will in general bind the bank in favor of third persons possessing no other knowledge. *The directors may limit his authority as they deem*

proper, but this would not affect those to whom the limitation was unknown."

For many purposes the Cashier, as much as the Board of Directors, is the agent of the Bank.

In Thompson's Com. on the Law of Corporations, Section 4740, it is said:

> "A cashier of an incorporated bank is regarded in law as its general executive officer. He is in no sense the agent of the Board of Directors. He is a statutory officer, not of the directory but of the corporation. . . . Though chosen by the directors, he is as much the statutory agent of the corporation as the directors themselves."

In Mechem on Agency, Section 718 (Ed. 1889), it is said that a notice to, or the knowledge of an agent like a cashier, is the knowledge of the corporation, except (1) when it is the duty of the agent (like a lawyer or a priest) not to disclose what he knows, or (2) when the agent is really acting in his own interest or in another's interest, and adversely to the principal, and where there is collusion, and (3) when the person claiming the benefit of the notice was in collusion with the agent to cheat or defraud his principal. None of those exceptions apply in this case.

See Story on Agency, Section 140 (*b*), Thompson on Corporations, Section 5224, and Morse on Banks and Banking, Sections 152-3, 166.

In the Distilled Spirits, 11 Wallace, 356, the Supreme Court held that the knowledge of an agent who bought the distilled spirits that they had been removed from the warehouse by fraud, was the knowledge of his principal.

In Biswell v. First National Bank of Franklin, 69 Pa. St. 415, it was held that the cashier is the agent of the corporation, not of the directors; that what he knows the bank knows, even though he should not communicate the knowledge to the board of directors. That case is exactly in line with the opinion of Judge Story in Minor v. The Mechanics Bank of Alexandria, 1 Peter, 46, in which case it was held that the cashier, in some

respects, is as much the representative of the bank as the Board of Directors, and that he can not excuse himself for improper practices even by showing an order from the board; that he is not merely the helpless creature of the board, but is the agent of the bank itself; that he can not blindly do improper things on the order of the board, much less on the order of the President.

In the Birhamham Trust and Savings Company v. The Louisiana Bank, 99 Ala. 379 (1893), it was held that the cashier's knowledge of a pledge was the knowledge of the bank, the Court saying:

> "Otherwise knowledge or notice could never be traced to the corporation, and the utmost insecurity in dealing with it would follow. And upon general principles of public policy it is and must be presumed that the agent communicates to the principal the facts of which he acquires knowledge or notice. If the communication is not made, it is the fault or neglect of the agent, which must be visited on the principal, rather than upon strangers dealing with the agent, within the scope of the agency."

To the same effect are Potter v. The Bank of Rutland, 19 Ver. 410; Central National Bank v. Levin, 6 Mo. App. 543; Holden v. The New York & Erie Bank, 72 N. Y. 286 (1878); Duncan v. Jaudon, 15 Wallace, 165.

In Veasy v. Graham, 17 Ga. 99, the President and Cashier of a Bank made a deed to the President of the Bank's property, and this deed was set aside, the Court saying:

> "The Cashier had actual notice of the fact, because he aided in executing his title. To whom else should notice have been given? The stockholders or the directors or both? We know of no such practice."

In A. C. Freeman's exhaustive notes to the case of the Bank of Pittsburg v. Whitehead, 36 Am. Dec. 186 (10 Watts, 396), it is said that "a corporation must be held to know what its President and general officers know;" that what is known to the President and Cashier is known to the Bank; that "the Cashier of a Bank is its general agent, managing all its concerns, except

such as are committed directly to the Bank Directors." To the same effect are the cases of New Hope Delaware Bridge v. Phoenix Bank, 3 New York, 156; McGurk v. Metropolitan Life Insurance Company, 1 Law Rep. Ann. 563, or 56 Conn. 528; Bank of America v. McNeal, 10 Bush (Ky.), 54; Cook on Corporations, Sec. 727; Thomson-Huston E. Co. v. The Capitol Electric Company, 65 Fed. Rep. 341; Wilson v. Pauly, 77 Fed. Rep. 129.

In Mechanics' Bank v. Gilmartin, 93 Ga. 504, it was held, on circumstantial evidence, as in our case, that the President of the Bank, who knew that the Cashier was speculating and saw him in consultation occasionally with brokers and learned casually from them that he was dabbling in stocks, must be presumed to have sufficient knowledge to put him on inquiry, and his knowledge was imputed to the Bank, and the Bank was held liable for the bonds fraudulently converted by the Cashier.

The rule we are contending for is not at all modified or impaired by the decision in the case of the American Surety Company v. Pauly, 170 U. S. 559, in which the Supreme Court recognized the soundness and the binding force of the foregoing authorities, and admitted that the general rule was the one for which we are contending. In that case the Supreme Court quotes with approval the charge of the lower court to this effect:

> "Ordinarily a corporation, like any other principal, is chargeable with the knowledge of any facts which are known to its agent, but in this case all the transactions, if there were any transactions of a fraudulent and dishonest character on the part of the Cashier, were transactions for the benefit of Collins, and he was a participator in the fraud, and under these circumstances the law does not infer that the agent or the officer will communicate the fact to his principal, the corporation."

Justice Harlan, in rendering the opinion of the Supreme Court, held that, as President Collins and Cashier O'Brien were in collusion to defraud the Bank, the knowledge of neither one could be imputed to the Bank, because it could not be presumed

that they would tell the Board of Directors that both of them were defrauding the Bank. The Supreme Court said:

> "The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends, or to commit some fraud against the principal. In such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or, having received notice of them, failed to disavow what was assumed to be said and done in his behalf."

The Supreme Court then quotes a large number of authorities, all holding in substance that when the agent is himself trying to defraud his principal it will not be presumed that he communicates to his principal the knowledge he has, or that he tells the principal just how he is trying to defraud the principal; and then the Supreme Court continues:

> "Further citation of authorities would seem to be unnecessary to support the proposition that, if Collins gave the certificate that he might, with the aid of O'Brien as cashier, carry out his purpose to defraud the Bank for his personal benefit, the law will not presume that he communicated to the Bank what he had done in order to promote the scheme devised by him in hostility to its interests. In our judgment the Circuit Court of Appeals correctly held that plaintiff's right of action on the bond was not lost because its President, Collins, made to the defendants false representations as to the cashier's honesty; and that, when two officers of a corporation have entered into a scheme to purloin its money for the benefit of one of them, in pursuance of which scheme it becomes necessary to make false representations to a third person, ostensibly for the Bank, but in reality to consummate such scheme, and for the benefit of the conspirators, and not in the line of the ordinary authority, the corporation being ignorant of the fraud, the officers are not, in thus consummating such theft, the agents of the corporation."

This was the principle on which the Court rested its opinion, and in so doing it laid down the law exactly as it is stated in

Mechem on Agency, Sec. 718, a section which we have heretofore quoted. Mechem says there are only three exceptions to the rule that the knowledge of the agent will be imputed to the principal, and those three exceptions are the following:

> "(1) Where it is such as it is the agent's duty not to disclose (as where he gets confidential knowledge as an attorney, priest, etc.), and,
>
> "(2) Where the agent's relation to the subject-matter or his previous conduct render it certain that he will not disclose it (as where he is trying to carry out or aid another in carrying out a fraudulent scheme, such as Collins and O'Brien were carrying out), and,
>
> "(3) Where the person claiming the benefit of the notice, or those whom he represents, colluded with the agent to cheat or defraud the principal."

In the McKnight case the Cashier was not acting in collusion with the President. There is no pretense that the Cashier was purposely trying to assist McKnight in defrauding the Bank. The proof showed that the feeling between McKnight and the Vice-President was unfriendly, and that the Cashier, on the night of the Britt and Reeder transaction, went as late as nine o'clock in the evening to the Vice-President's house to notify the Vice-President, who was a director, that McKnight, whom he disliked, had carried out that corrupt deal with Britt and Reeder. Hence it appears that the case of the American Surety Company v. Pauly is a direct authority in favor of the petitioner, and is in line with the text-books and cases cited and relied on in this brief.

THIRD POINT.

A Cashier's reply in due course of mail to a letter of inquiry addressed by a surety to the Bank itself is admissible as evidence against the Bank without preliminary proof by the surety that the Board of Directors gave formal or special authority to the Cashier to write that particular letter; but the contrary principle has been established in this case by a majority of the court below in misapprehension of the meaning of the Pauly case.

The surety, on May 15, 1896, wrote a letter to the German National Bank, and asked the Bank to certify whether or not McKnight's books and accounts were correct, and whether all moneys handled by him had been accounted for. The Cashier, in due course of mail, returned the certificate on May 29, 1896, and said: "He has performed his duties in an acceptable and satisfactory manner, and we know of no reason why the guarantee bond should not be continued."

The court below refused to allow that letter or certificate of the Cashier to be read to the jury, because the surety was not able to prove that there had been a formal vote by the Board of Directors authorizing him to write such a letter. It can not be disputed that a surety is entitled to an honest and candid answer from the employer when inquiry is made; and, when the answer is returned in due course, and by one apparently authorized to answer, the surety should be able to rely upon the answer; but the court below held that the answer of a cashier to a surety, in due course, can not be proven unless proof is made that by formal action of the board itself he was authorized to write that particular letter. Such proof would generally be impossible. This decision was based upon the language used in the American Surety Company v. Pauly, and yet we respectfully submit that the decision in that case will not bear such a construction.

In the first place, we sought to show by the Cashier himself that this bond was not obtained by McKnight for his own benefit, but that the Bank itself (R. 54) selected the surety of the

President and Cashier and paid for the bonds, and that "all these bond matters were discussed by the Board of Directors," but the lower court would not allow us to prove these facts. In the second place, because the Supreme Court in the Pauly case said that a president could not, in a mere letter of recommendation for the cashier when he was first applying for a bond, bind the bank by his statement, the Circuit Court in this case has held that a cashier could not answer an inquiry by a surety in due course of business and state as a fact how the President had performed his duties unless the cashier had been first authorized to answer by a formal resolution of the Board of Directors.

A contract made by a bank with a surety is like any other contract made by a bank, and a letter written by a cashier on that business is like any other letter written by him on the business of the bank. If the Courts attempt to draw distinctions between the various contracts made by a bank and between the multitudinous letters which a cashier must write in the ordinary course of business, and to say that, as to certain contracts, he can speak for the bank in its correspondence without formal proof of his authority, but, as to other contracts, he can not write without a formal resolution of the board, and that when he has written a letter it can not be proven till formal proof is made of his authority to write that particular letter, the Court will get into endless difficulties, and the public will never be able to rely upon the letters or assurances of the only officer who is, by usage and by law, authorized generally to act and to write for the bank. The decision in this case is not a logical corollary of the Pauly case, and is in conflict with the text-books and decisions which have long settled the law as to the inherent powers of a cashier. Not only will this decision unsettle the law, but it will make the transaction of business with a bank troublesome and unsafe. One of the judges of the Circuit Court of Appeals did not approve this departure from a well-settled rule.

There is a wide difference between the duties and powers of a President and a Cashier. The Cashier is the chief executive

officer of the bank. To him is entrusted the duty of conducting the correspondence of the bank. Persons who receive letters from him about the contracts of the bank can not require, as proof of his authority, a certificate of the board that he has been authorized to act. That would stop the business of a bank. If he said in his letter that he had been authorized to act, outsiders would still not know whether his statement was true. To write at all is a tacit assurance that he has been authorized to write. When inquiries are addressed to the bank (as in our case), his answer must be presumed to be authorized, at least until the contrary is shown. To require proof of his authority in each case, or in ordinary cases, would be unreasonable and clog business, and would prepare endless traps for honest but unwary men. If the law were so unreasonable, a bank could often get an advantage of others by simply taking no formal action that could be proved, and by giving to the Cashier no special authority that could be established by evidence in court. While he was entrapping unsuspecting parties dealing with him in good faith on the assumption that he was authorized to do what he held himself out as able to do, the Board could sit still complacently and having eyes see not, and having ears hear not; but in the end could keep the benefit while repudiating the corrupt means by which it was attained.

In this very case the Bank, as well as McKnight, wanted his bond renewed. It could not get the bond renewed without a statement by its cashier to the effect that McKnight's accounts and moneys were correct, and that he had performed his duties in an acceptable and satisfactory manner, and that no reason was known why the guarantee bond should not be continued. The letter was addressed to the Bank; the Cashier responded and made the statement necessary to enable the Bank to get what it wanted. It got the benefit of the Cashier's letter, and is now contending that he had no authority to write the letter. The Bank was paying for the bond. That is the custom now with the banks. It is admitted that we were deceived by the letter of the Cashier;

that but for that fraud we would not have executed the bond. In conscience and in law the Bank can not hold the advantage while repudiating the false statement made by the only officer that could conduct its correspondence.

The renewal of this bond was the business of the Bank; as much so as any other business it had. This answer of the cashier to our inquiry was made in the regular course of business, and came strictly "within the customary or ordinary duties of a cashier." He was not acting "outside of his ordinary duties." On the contrary, he was acting "within the scope of his agency." We have shown that there was no collusion between the Cashier and the President, and that the Cashier informed his father, the Vice-President and director, of every thing that went on at the Bank, and that the father, during 1896, was not friendly to McKnight. As the Bank ratified the act of the Cashier in writing that letter for the purpose of continuing the bond from June 1, 1896, to June 1, 1897, and as we renewed the bond on the faith of his letter of May 29, 1896, and as we would not have renewed the bond but for that letter, the Bank can not hold the benefit of the renewal bond without ratifying and approving the act of the Cashier in writing the letter.

In Morse on Banks and Banking, Sec. 162, it is said that "the Cashier has charge of the correspondence of the bank," and that "letters on corporate business are properly addressed to him, and whatever statements or information are contained in them will, in law, affect the bank with notice." See Sec. 165 (*b*); Section 171 (*d*). In Section 98 (*c*) the same author says that "whether at common law or under such statutory enactments, they (the directors) seek to curtail the ordinary powers of any of their officers, their action in so doing can only be valid as between the officer and the bank."

In Boone on the Law of Banking, Sec. 115, it is said: "The cashier is also the agent of the bank for the purpose of writing and receiving letters on the subject of its ordinary business. A letter from him on the business of his bank is a letter from his bank, and a letter to him relating to the business of his bank

is a letter to his bank; and the bank is chargeable with knowledge of the contents of such letter."

In Thomas v. Wells, 140 Mass. 517, it was held that where a letter was written to a firm and it was answered on the letter-head of the firm by an agent who ordinarily did not conduct the correspondence of the firm, the letter was nevertheless admissible against the firm, the Court saying:

> "It was written upon the business paper of defendant's firm, and was in answer to a letter sent two days before by the plaintiffs to the defendants, to which plaintiff required an answer and to which no other answer was returned. Upon this evidence it was not a violent inference for the jury to draw that the plaintiff's letter had been handed for an answer to Wells, the salesman who had made the contract with the plaintiff and knew what its terms were."

See Morse v. Conn. River R. Co., 6 Gray, 450; McGenness v. Adriatic Mills, 116 Mass. 177.

In McGee v. The Manhattan Life Insurance Company, 92 U. S., page 93, the Supreme Court held that, though a surety might not be released where he did not ask for information, he would be released when he asked for information and was not given a true answer, the Court saying: "If the surety desires information, he must ask it. . . . If the creditor be applied to, he must make a full and frank communication." (See Brandt on Suretyship and Guar. (Ed. 1891), Secs. 421, 422, 423.)

In Merchants Bank v. The State Bank, 10 Wallace, 604, it was held:

> "Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists."

In Xenia Bank v. Stewart, 114 U. S. 224, the Court said:

> "The letter was written on the paper of the Bank and by the person shown to be its cashier, and it appears with reasonable certainty to have referred to the business of the Bank. The Court was, therefore, right in not excluding it from the jury."

See Case v. The Bank, 100 U. S. 446–454; Martin v. Webb, 110 U. S. 7; Badger v. Bank of Cumberland, 26 Maine, 428; *Coldwell v. National Mohawk Bank, 64 Barbour, 333; Birmingham Trust & S. Co. v. Louisville Bank, 20 Law Rep. Ann. 600.*

Morse on Banks and Banking, Section 103, says:

> "Where the officer of the Bank knows that his answer to the inquiry (for information) is to form the ground of future action on the part of the inquirer, so that accurate information is not merely desired to satisfy a curiosity as to an occurrence wholly in the past, but is sought and needed for governing important dealings in the present and future—there the Bank is bound."

In the Pauly case, Justice Harlan, in the opinion, cites the case of Bennett v. Judson, 21 N. Y. 238, as follows:

> "In Bennett v. Judson, which was the case of an agent of the vendor of land who made material misrepresentations as to its location and qualities, assuming to have knowledge of the facts, but without express authority from his principal, the Court said: 'There is no evidence that the defendant authorized or knew of the alleged fraud committed by his agent Davis in negotiating the exchange of land. Nevertheless, he can not enjoy the fruits of the bargain without adopting all of the instrumentalities employed by the agent in bringing it to a consummation. If an agent defraud the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may, no doubt, rescind, when he discovers the fraud, on the terms of making complete restitution; but so long as he retains the benefit of the dealing he can not claim immunity on the ground that the fraud was committed by his agent and not by himself. This is elementary doctrine, and it disposes of one of the questions raised at the trial.'"

As the lower court in the McKnight case excluded this letter of Cashier Reutlinger to the surety, and as a majority of the Judges of the Circuit Court of Appeals approved this action solely because they thought they were constrained to do so by the ruling in the American Surety Company v. Pauly, it may be well to note the marked difference between that case and this.

In the suit on the O'Brien bond, it appeared that President Collins simply gave a certificate of good character to O'Brien when the latter was first applying for a bond. That was merely the answer of an individual to whom, as a friend of O'Brien, an inquiry had been addressed; that was no part of the business of the President of the Bank. It is not the business of a President to conduct the correspondence of the Bank, and the letter of inquiry was not addressed to the Bank. In the McKnight case the letter was addressed to the Bank itself, and it called, not for a letter of recommendation, but for a frank, fair statement as to certain facts known to the Bank or its Cashier. That letter of the surety could be answered only by the Cashier. McKnight himself could not answer it, and the Board of Directors could speak only through the Cashier; and, as we have shown, by law and by custom, the cashier is the proper one to answer all correspondence. In the O'Brien case it was a question merely of character; and the surety and the Bank had had no dealings together before. In the McKnight case there was no longer any mere question of character, but a question of fact, namely, whether McKnight had performed his duties during the past year in an honest and satisfactory manner. That was a matter that concerned the Bank itself, and about which there could be no doubt, and as to which the surety was entitled to a frank and correct answer. In the opinion in the Pauly case Justice Harlan lays stress upon the fact that President Collins' answers were merely commendations of a man who had not yet given a bond to the Bank with that surety, the Court saying: "No relations existed between the Bank and the Surety Company until O'Brien presented to the former the bond in suit."

The true meaning and effect of the Pauly case should now be made clear for the guidance of sureties and of other courts.

FOURTH POINT.

The words "immediate notice" are stronger than the words "with reasonable promptness" or "within a reasonable time;" and "immediate notice" implies prompt, vigorous action without any laches or needless delay; and where there is no dispute as to the facts, this question is one of law; and two or three weeks' delay in writing a short letter as a notice to the Surety after fraud has been discovered is not "immediate notice."

Under the bond the surety was entitled to immediate notice of McKnight's first default. That notice was not given, and the Circuit Court of Appeals has decided in this case that "immediate notice" is the same as "notice with reasonable promptness." We respectfully submit that that is not consonant with the authorities. The bond provides as follows: "That the German National Bank shall (*a*) immediately give the Company notice, in writing, of the discovery of any default or loss hereunder, and (*b*) shall file with the Company his or their claim hereunder, with full particulars thereof, as soon as practicable thereafter," etc.

Here two things are stipulated for, (1) an immediate notice, and (2) a claim "as soon as practicable thereafter." The Circuit Court of Appeals has practically decided that the word "immediate" is exactly the same in meaning as the words "as soon as practicable thereafter"; and yet the difference between these words is here brought into sharp contrast by the contract itself. The parties in interest evidently intended to make a clear distinction, which the Court has ignored.

It is manifest that Vice-President and Director Reutlinger, and Cashier Reutlinger and Director Reisch, knew of McKnight's defaults in January, 1896, and hence an "immediate notice" should have been sent to the surety at that time. If we conceded, however, merely for the sake of argument, that the

knowledge of these officers of the Bank was not the Bank's knowledge, still the surety was entitled to immediate notice from the Receiver in this case, and such immediate notice was not in fact given. If, as the Circuit Court of Appeals has held, a letter such as Receiver Courtney wrote to the surety on February 18, 1897, is sufficient in form and substance, there is no reason why such a letter could not have been written and sent through the mail within one day or two days of his discovery of the first default. The writing of such a letter was a matter of a few moments, and such an important business transaction, so easily attended to by him and so vital to us, should not have been delayed a day. The Circuit Court of Appeals admits that he delayed the writing of such a short note without any excuse whatever for at least two or three weeks. That was not good faith to the surety, and was not a compliance with the bond. It was highly important to the surety that it should know at once of its peril when the Bank Examiners and the Receiver first discovered a default, and when McKnight was put in prison for his frauds. The surety should have been allowed a chance at once to take steps to secure indemnity from McKnight or his friends or to attach his property. To keep the surety in the dark for even two or three weeks, while McKnight's property could easily have been put beyond reach of the surety, when the Receiver had only to spend five minutes in writing such a notice as he sent to the surety, was unreasonable and unpardonable. It was not immediate notice, and it was in clear defiance of the plain letter and evident spirit of the bond. The Receiver might with reasonable excuse have delayed two or three weeks to make out a formal claim and prepare proofs and get exact information for such a document, but he did not need a single day for the petty task of writing such a letter as he in fact wrote on February 18, 1897.

Bouvier's Law Dictionary, quoted by the Circuit Court of Appeals, says: "The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression

'within a reasonable time,' and imply prompt, vigorous action without any delay, and whether there has been such action is a question of fact having regard to the circumstances of the particular case."

In other words, this authority does not agree with the opinion of the Circuit Court of Appeals and the Circuit Court that the word "immediately" means only "within a reasonable time." If, as the Circuit Court of Appeals admits, the Receiver and the experts "began to discover them (the defaults) two or three weeks after the bank was closed," or in other words, that "the discovery was first made between the second and ninth of February, 1897," and yet that the Receiver did not write his short note to the surety until February 18, 1897, that certainly was not "prompt, vigorous action without any delay." That was gross laches, and a great wrong to the surety. No excuse whatever has been offered for the long delay of so simple a matter.

The Circuit Court of Appeals said:

> "We have already said no notice is required until the Bank had knowledge of facts which would justify it in charging dishonesty. . . . Assuming that the defalcations were becoming apparent to the experts so that they began to discover them two or three weeks after the Bank was closed, we can not say as a question of law that such facts had been discovered as would justify a prudent man in charging another with dishonesty so as to require notice, etc."

It is conceded that the Bank because of an examination by the Bank Examiner, and the discovery of fraud, was closed on the 17th of January, 1897. "Mr. McKnight (Record 43) was arrested the following day after the closing of the Bank." In other words, McKnight was promptly charged with dishonesty. Evidently "such facts had been discovered as would justify a prudent man in charging him with dishonesty." The Receiver himself said (Rec. 42): "Almost immediately after the Bank passed into my hands as Receiver I began to ascertain the defalcations. . . . The experts were at work immediately after Mr.

McKnight's arrest. *I kept pace with their investigation.* It was almost immediately after the Bank closed that these defalcations became known, not all of them, but enough to ground the claim upon." The Examiner himself said: "We began to get these shortages about two or three weeks after the Bank was closed. They were discovered from time to time. I began to discover them in two weeks."

With the Bank closed by the Controller of the Currency for fraud after a previous examination by the Bank Examiner; with McKnight under arrest evidently for such fraud, and with the Receiver fully informed of the very first discovery of the frauds, which must have been discovered even before two weeks, but which were undoubtedly discovered in two weeks after the Bank closed, the Receiver, though bound to give us immediate notice, would not undertake the petty labor of writing eleven lines to us until two or three weeks had passed—until from fourteen to twenty-one days had passed, if we take the estimate of the Circuit Court of Appeals. Was that fair to the surety? Was that "prompt, vigorous action?" Was it reasonable or in accordance with the letter or spirit of the bond?

In the case of Innmann v. The Western Fire Insurance Company, 12 Wend. N. Y. 452, the Court said that even *one week* would not be "forthwith." In Edwards v. Lycoming Insurance Co., 75 Pa. St. 378, the Court held that a notice delayed *eighteen days* was not "forthwith." In Trask v. The State Fire Insurance Company, 29 Pa. St. Rep. 198, the Court held that a notice delayed *eleven days* was not immediate notice. In the Railway Passenger Association Company v. Burwell, 44 Ind. 460, it was held that a notice delayed *six days* was not "immediate" notice. In Harbour Commrs. v. The Guarantee Company of North America, 22 Canada Sup. Court, 542 (see note 19th C. C. A. 276), it was held that a delay of *a week* was not immediate notice. In the Queen v. The Justice of Berkshire, 4 Q. B. Div. 469, a delay of *four days* was held not to be immediate notice, the Court saying: "The words 'forthwith' and 'immediately' have the

same meaning. They are stronger than the expression 'within a reasonable time,' and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact having regard to the circumstances of the particular case."

In the case of Streeter v. Streeter, 43 Ill. 155, the Court held that immediate notice had not the same meaning as the words "as soon as could practically be done." In our case the lower court in its charge to the jury told them that "immediate" notice meant "that it was the duty of the plaintiff in this case to give, as soon as was reasonably practicable, and with promptness notice of the discovery of any default;" that "immediate" notice meant "within a reasonable time." In this case there was no dispute as to the facts bearing on the question of the time of the Receiver's discovery of McKnight's defaults and the time he gave the notice. All the testimony on that subject was offered by the complainant, and there was practically no conflict in the evidence as to this point. In May on Insurance, Section 462, quoted by the Circuit Court of Appeals, it is said:

> "Whether due diligence has been used in giving the notice is a question which is ordinarily left to the jury to be found from all the circumstances in the case. Where the facts and circumstances bearing upon the question of due diligence are not in dispute, it becomes a question of law for the Court."

In the Pauly cases there was a conflict of evidence as to when the Receiver got notice of a default; but it was certain that the Receiver gave *a notice in two or three days* after the Examiner reported that there was a default. In our case, the Receiver, as he admits, kept pace with the Examiner, who discovered defaults in two weeks after the Bank was closed. McKnight was arrested one day after the Bank was closed, and yet *the Receiver's short letter was not written to the surety until thirty days after McKnight's arrest, and thirty-one days after the Bank was closed*, and at least ten to seventeen days after the Examiner and Receiver had discovered at least some of the defaults set up in this

action. Here there were not merely suspicions of fraud. The President was actually arrested for fraud the day after the Bank closed.

In the American Surety Company v. Pauly, 170 U. S. 160, it is said:

> "There was evidence tending to show that although the Receiver had reason, in the months of January, February, March, or April, 1892, to believe that there were *irregularities* on the part of Collins as President of the Bank, he did not become aware of any specific acts of *fraud* or dishonesty by him until the expert book-keeper employed to examine the Bank's books informed him *a few days prior to May* 23, 1892 [the date of the notice], that he had discovered false entries showing fraud and dishonesty on the part both of Collins and O'Brien."

In the American Surety Co. v. Pauly, 170 U. S. 139, the suit on the bond of Cashier O'Brien, Justice Harlan said:

> "The Receiver was not aware of 'the amounts or specific conditions' of such irregularities, nor of any specific act of fraud or dishonesty upon the part of the cashier, until the expert book-keepers had completed their examination of the books of the Bank *about May* 23, 1892, *on which day* the Receiver wrote to the Surety Company, etc."

In another place (p. 139) Justice Harlan said:

> "*Towards the end of May* the experts made certain discoveries involving the fidelity and integrity of O'Brien as cashier, of which Bloodgood gave notice to the Receiver [May 23d]."

In other words, the Supreme Court thought that the Receiver did not get notice of any default of the President or Cashier until a few days before he sent the letter of May 23d, and that that was immediate notice, or at least that the jury might find such notice to be immediate. In the McKnight case the directors and the Cashier had known of the Edmunds and the Britt and Reeder defaults for more than a year; and it was a matter which the Bank Examiner and the Receiver must have learned

immediately when the Bank closed and McKnight was under arrest for fraud, and they certainly knew of some one of these defaults at least two weeks before the letter was written, and may have known of them four weeks before. It seems clear, therefore, that the Court erred in allowing the Receiver in this case to offer his letter of February 18, 1897, as "immediate notice" under the contract. In some insurance cases the Courts have been indulgent where ignorant or unbusiness-like people have been a little slow in sending a notice, but here we have an expert, a Receiver who understands the meaning of words and the need of speed and the danger of delay, who waited unreasonably long before writing a short letter to the surety as a notice under the bond.

FIFTH POINT.

A claim against a Bank President's surety is not made "as soon as practicable" if not made till five months and a half after the bank is closed and the President is arrested for fraud, and four months and a half after a notice of the fraud is sent to the surety and nearly four months after an attachment suit has been brought by the Bank's Receiver against the President.

The claim made July 2, 1897, was too late. The language of the bond is that the Bank, after the "immediate notice" has been given, "shall file with the Company his or their claim hereunder, with full particulars thereof, *as soon as practicable thereafter.*" It was not proper for the Bank or the Receiver to wait until all was known of McKnight's defaults to file that claim. In the American Surety Company v. Pauly, 170 U. S. 146, it appears that the defaults of O'Brien were not discovered by the Receiver until some time after May 1, 1892. The first notice was sent on May 23, 1892, and later the formal claim or demand was made on June 24, 1892. In other words, the claim was made by the Receiver about thirty days after the notice of

May 23, 1892, and that delay of one month was held not to be too long.

In the McKnight case the claim was not made until about five months and a half after the Bank was closed, about four months and a half after the notice of February 18, 1897, was sent, and nearly four months after the Receiver, on March 6, 1897, had brought a suit against McKnight and attached his property. And in that suit the Receiver was seeking to recover against McKnight $6,989.00 for defaults, on which the surety has now been held liable. If the Receiver had such specific and accurate information on which he could sue McKnight on March 6, 1897, he should have made a claim against the surety at once. All of the defaults on account of which the Receiver sought at the trial to hold the surety did not amount to more than about $11,000.00, and of that sum $6,989.00 was embraced in the suit filed by the Receiver against McKnight on March 6, 1897. While the Receiver was taking attachments against McKnight's property, less than two months after the Bank was closed and a few weeks after the first letter had been sent to the surety, no claim was given to the surety sufficiently definite to enable the surety to protect itself by similar proceedings against McKnight. That certainly was not obeying the agreement in the bond "to file with the Company his or their claim hereunder, with full particulars thereof as soon as practicable thereafter."

Respectfully but earnestly we submit that this is a case in which a writ of certiorari should be granted, in order that the Supreme Court may establish a clear and wise rule for the guidance of everybody interested in the execution or construction of surety-bonds, and in order that the principles laid down in the Pauly cases may not be stretched to unforeseen and unreasonable limits.

EDWARD J. MCDERMOTT,
Counsel for Fidelity & Deposit Company of Maryland.

ST. JOHN BOYLE,
Of Counsel.